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In the Supreme Court of the United States

OCTOBER TERM, 1978

DOUGLAS M. COSTLE, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY,
PETITIONER

v.

PACIFIC LEGAL FOUNDATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR PETITIONER

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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1. The essence of this case is that the Environmental Protection Agency issued regulations stating the conditions under which it would hold an APA-type adjudicatory hearing before issuing, denying, modifying, or revoking a National Pollutant Discharge Elimination System permit. Respondent Kil-

roy requested an "adjudicatory hearing" but failed to satisfy a prerequisite for such a hearing under the regulations—he did not identify any material issue of fact as to which an evidentiary hearing was appropriate. EPA, therefore, did not hold such a hearing. Notwithstanding Kilroy's failure to satisfy this administrative requirement, the court of appeals held that Kilroy was denied an "opportunity for public hearing" within the meaning of Section 402(a)(1) of the Federal Clean Water Act, 33 U.S.C. 1342(a)(1). The court held that EPA must routinely hold adjudicatory hearings when NPDES permits are issued, denied, revoked or modified—even in the absence of a request for a hearing—except when such hearings would be "futile," and that EPA may not limit adjudicatory hearings to those circumstances defined in its regulations.

The issue presented in this case, therefore, is whether EPA's regulations (40 C.F.R. Part 125) provide a sufficient "opportunity for public hearing" within the meaning of Section 402(a)(1) of the Act, 33 U.S.C. 1342(a)(1). As set forth in more detail in our petition (at pages 3-4), those regulations provide for three types of "hearings": (1) a "legislative-type" hearing at which interested persons may submit information and comments to the agency, 40 C.F.R. 125.34; (2) an "adjudicatory" hearing for the trial-type determination of "material issues of fact relevant to the questions of whether a permit should be issued, denied or modified," 40 C.F.R. 125.36(b), (c); and (3) a procedure for the submission to and

determination by the agency of any issue of law concerning the issuance, revocation, denial or modification of permits. 40 C.F.R. 125.36(m).

Each type of hearing has its own prerequisites. A legislative-type hearing is required only when the regional administrator finds that there is enough public interest in the proposed action, after public notice, to warrant such a hearing, 40 C.F.R. 125.34. An adjudicatory hearing is required only if an interested party presents a request for an adjudicatory hearing which states with particularity the reasons for the request and the factual issues to be considered (40 C.F.R. 125.36(b)(1), (b)(2)), and the regional administrator determines that the request "[s]ets forth material issues of fact relevant to the questions of whether a permit should be issued, denied or modified." 40 C.F.R. 125.36(c)(1)(ii). Determinations of issues of law are made only upon request by an interested party who sets forth the legal ground for objection to the agency actions. 40 C.F.R. 125.36(m).

In the present case, the agency determined, after public notice, that a legislative-type hearing was not warranted. The agency held no adjudicatory hearing because no one tendered a request presenting material issues of fact. Kilroy filed a "request for an adjudicatory hearing" but the only two issues raised were questions of law, not of fact. The agency considered the issues and resolved them on the merits against Kilroy. The court of appeals did not disturb EPA's decision not to hold a legislative-type hearing.

Neither did it question EPA's resolution of the issues of law tendered by Kilroy.

This holding, as explained in our petition (at pages 13 to 16), conflicts with *National Independent Coal Operators' Association* v. *Kleppe*, 423 U.S. 388, 397-398 (1976). There, the Court held that a statutory "opportunity for hearing" does not require an "automatic" hearing. The hearing may be keyed to a request. The Court has also held that an agency may establish reasonable prerequisites for granting a hearing and "barring at the threshold those who [do not] measure up to them." *FPC* v. *Texaco, Inc.*, 377 U.S. 33, 39 (1964); *Denver Union Stock Yard Co.* v. *Producers Livestock Marketing Ass'n*, 356 U.S. 282, 287 (1958); *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956). The requirement that parties file requests setting forth material factual issues is a reasonable prerequisite to granting an adjudicatory hearing. A rule mandating routine adjudicatory hearings, as we have explained, would impose an undue burden on the agency (Pet. 16-17).

2. Respondents Kilroy and Pacific Legal Foundation (PLF) contend that certiorari should be denied for several reasons, which deserve reply. They contend (PLF Br. 6-7)[1] that EPA failed to provide them with adequate notice of the proposed extension. They assert that "Kilroy did not see the notice published

[1] "PLF Br." refers to the brief in opposition filed by PLF and Kilroy.

in the *Los Angeles Times*" and "neither PLF nor Kilroy received actual notice of the proposed action."[2] The adequacy of the newspaper notice, however, is not presented by the circumstances of this case. That issue would arise only if the court of appeals had remanded for a legislative-type hearing on the theory that the public had not been given sufficient warning of EPA's proposed extension of the permit. Respondents had sufficient notice to make a request for an adjudicatory hearing and they in fact did so, although the request was limited to legal issues. That the request was made and that EPA considered it on its merits eliminate any issue concerning the sufficiency of the notice for purposes of this case.[3]

3. Respondents also contend (PLF Br. 8-9) that Kilroy's request posed more than issues of law and also presented the factual issue whether the " 'record developed' " was inadequate to issue the permit. Aside from the fact that respondents do not, even now, identify specific factual deficiencies in the record, it is all too plain that the request raised only two issues of law. Kilroy's original request tendered two "issues to be raised." One of these concerned whether

[2] Respondents carefully avoid stating that PLF did not see the newspaper notice. We assume for purposes of argument only that PLF did not see the newspaper notice.

[3] For the same reason, it is immaterial that respondents had "to file a Freedom of Information Act request" to determine the status of the extension proceedings (PLF Br. 6). Whatever information respondents lacked was cured by the time the request for an adjudicatory hearing was made.

it was proper to extend the permit while an environmental impact statement was in preparation for EPA's decision to fund the interim sludge project (Pet. App. 26a). This is a legal matter.

The other issue was phrased as "whether the procedures used and the record developed were adequate [for the] issuance of an NPDES permit." This, however, was but a restatement of respondent's contention that the action taken was an "issuance" rather than an "extension" of a permit.[4] Any doubt on this score was eliminated when Kilroy, represented by PLF, restated the two issues that he desired to raise (Pet. App. 31a-32a):

> Requestor of the adjudicatory hearing, John B. Kilroy, proposed to raise two basic issues:
>
> 1. Whether there is authority under either the applicable statutes or regulations to extend the expiration date of an existing National Pollutant Discharge Elimination System (NPDES) permit, or whether the action taken by EPA with regard to Permit No. CA0109991 was the issuance of a new permit; and
>
> 2. Whether EPA should require that a permittee go forward with a project contained in an NPDES compliance schedule when that project is being studied in an environmental impact statement (EIS) pursuant to the requirements of the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4332 *et seq.*, and Federal Water Pollution Control Act (FWPCA), 33 U.S.C. 1281, *et seq.*

[4] The request also stated that a "reason for the request" was because "the procedures for *issuance* of an NPDES permit pursuant to 40 CFR Section 125.2 *et seq.* were not followed, there are no provisions in the regulations for the extension of the expiration of an NPDES permit" (Pet. App. 26a; emphasis added).

Neither of these issues poses any factual question. Under these circumstances, the regional administrator properly determined that the request raised only legal issues.[5]

4. For similar reasons, respondents' attempt to distinguish *Kleppe* (PLF Br. 4) is unconvincing. First, respondents note that in *Kleppe*, the coal operators had actual notice from the agency of the proposed assessment, whereas EPA used "constructive

[5] In a related attempt to excuse their failure to raise material issues of fact, respondents argue (PLF Br. 8-9) that "EPA was well aware that PLF and Kilroy had substantial concerns about the environmental impact of the actions required in the permit" because in another lawsuit EPA had agreed that it and the City of Los Angeles would prepare an environmental impact statement concerning EPA's decision to fund the Hyperion Interim Sludge Project. Any such general "awareness," however, is no substitute for a specific request by respondents identifying concrete factual issues that deserve resolution, as required by 40 C.F.R. 125.36(b)(2). EPA was not required to speculate concerning whether respondents desired to have unspecified factual issues resolved as well as the legal issues they tendered. To the contrary, EPA was justified in concluding that the respondents' contentions in related litigation were adequately reflected in the legal issue, posed by Kilroy in this request, whether the ongoing preparation of the EIS required a postponement of any decision to extend the permit. See *Pacific Legal Foundation* v. *Quarles*, 440 F. Supp. 316 (C.D. Cal. 1977), appeal pending, No. 77-3844 (9th Cir.) (treating dispute between PLF and agency as one of law).

notice" in the form of a newspaper advertisement. As explained above, however, this difference is wholly immaterial since Kilroy had sufficient actual notice to file "a request for an adjudicatory hearing" and EPA determined the issues raised on the merits. Any deficiencies in the newspaper notice cannot excuse respondents' failure to include factual issues among the issues raised in the request.

Second, they contend (PLF Br. 4) that *Kleppe* is different because, there, the regulations expressly provided that the failure to request a hearing would constitute a waiver of the hearing, whereas EPA's regulations do not contain a similar provision. This distinction vanishes upon even a casual reading of EPA's regulations which provide that "if the Regional Administrator determines that the request fails to meet the requirements of [the provisions which require material issues of fact to be specifically identified] *he shall deny the request*" (emphasis added). 40 C.F.R. 125.36(c)(2).

Third, respondents contend (PLF Br. 4) that the coal operators in *Kleppe* failed to file a timely request, whereas Kilroy did but the request was "denied" anyway. EPA, however, denied Kilroy's request on the merits—by ruling against his legal objections. EPA did not deny the request for untimeliness.

Fourth, in a similar vein, respondents argue (*id.* at 4-5) that no request at all was filed in *Kleppe*, whereas respondent Kilroy did make a request in this case but it was "denied." EPA's "denial" of an evidentiary hearing, however, was due wholly to Kilroy's failure to specify a material issue of fact, as

required by the regulations. In sum, *Kleppe* holds that a statutory opportunity for a hearing may be keyed to request. There is no reason to adopt a different rule under Section 402(a)(1).

5. Respondents argue (PLF Br. 10-11) that we have exaggerated the burden of the court of appeals' decision. Respondents concede, as they must, however, that the "effect of the decision of the court of appeals is to require that EPA support a refusal to provide an adjudicatory hearing with a record which demonstrates 'that the material facts supporting the decision are not subject to dispute'" (*id.* at 10-11). This is severe enough, for it permits any interested party to do nothing more than make a bare request for an adjudicatory hearing without specifying the material issues of fact which require resolution; if the bare request is denied, the agency must show on judicial review that no genuine dispute exists over any fact that "supports" the decision.

But the court's opinion goes further. It also requires an adjudicatory hearing—even when no request is made—unless the agency can show that a hearing would be "futile" or "serve absolutely no purpose" (Pet. App. 20a). The court stated (*id.* at 18a-20a):

> The Administrator misconceives the showing that must be made to demonstrate that adequate opportunity for a hearing has been given. The necessity for a hearing turns not only on the vigor with which interested parties clamor for one, but also on whether a showing has been made demonstrating that a hearing is unnecessary.
>
> * * * * *

> The fact that no one requested a hearing prior to the decision is appropriately considered in this analysis, but it is not decisive. It must be shown that the material facts supporting the decision are not subject to dispute. We realize that this is a not inconsiderable burden to place on the agency, but it is appropriate in view of the strong policy in favor of holding public hearings before an adjudicative decision is made.

Respondents argue (PLF Br. 11) that the requirement that hearings be held routinely is no more burdensome than the agency's regulations which already require a public hearing, even in the absence of a specific request, where the agency finds "significant public interest" in the proposed action. See 40 C.F.R. 105.7(c) and 125.34(a). These provisions, however, apply only to legislative-type hearings, not adjudicatory hearings. Adjudicatory hearings, in contrast, are required under the regulations only when specific requests presenting material issues of fact are filed ~~and otherwise denied.~~ See 40 C.F.R. 125.36.

In sum, the requirement that the agency routinely conduct adjudicatory hearings[6] for every issuance, revocation, denial or modification of an NPDES permit (except in the rare case where such a hearing would serve "absolutely no purpose") will severely

[6] The court of appeals repeatedly stated that EPA was required to hold an adjudicatory, fact-finding, evidentiary, trial-type proceeding with all the protections of the Administrative Procedure Act, 5 U.S.C. 554, 556-557 (see Pet. App. 17a, 18a, 20a & n.4, 22a).

disrupt the NPDES program and erroneously divert scarce agency resources to what, in most cases, will be an unilluminating and time-consuming waste.[7]

For these reasons, as well as those set forth in our petition, we respectfully submit that the petition for certiorari should be granted.

WADE H. MCCREE, JR.
Solicitor General

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[7] Respondent City of Los Angeles essentially contends (Br. for Resp. 14) that, had it been aware of the terms and conditions of its 1975 permit, it would have requested an adjudicatory hearings. Respondent acknowledges that it must satisfy independently both the federal and the state discharge requirements but claims that it believed the federal compliance schedule was changed in 1976 by a joint EPA-state permit to conform to the more lenient state schedule (Br. for Resp. 6). The joint permit only stated, however, that the state compliance schedule had been modified. It extended the 1975 federal permit without modification of the federal schedule. The 1977 notice stated that EPA proposed to extend its own 1975 permit without other modification. No reasonable basis existed for believing the federal compliance schedule had been altered. If there was any basis for confusion, respondent took no action to clear it up before allowing EPA to proceed to extend the 1975 permit. In any event, the court of appeals did not rely on any confusion concerning the precise dates of the compliance schedule in ruling that EPA must routinely hold adjudicatory hearings.

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